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No. 84-1681

In the Supreme Court of the United States

OCTOBER TERM, 1984

MASTER PRINTERS OF AMERICA, PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether application of the disclosure requirements of Section 203(b) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 433(b)) to a trade association that engages in persuader activities violates the First or Fifth Amendments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 751 F.2d 700. A previous opinion of the court of appeals (Pet. App. 38-44) is unreported. The initial opinion of the court of appeals (Pet. App. 52-55) is unofficially reported at 105 L.R.R.M. (BNA) 2995. The opinion of the district court following the second remand (Pet. App. 31-37) is unofficially reported at 112 L.R.R.M. (BNA) 2504. The opinion of the district court following the first remand (Pet. App. 46-51) is unofficially reported at 105 L.R.R.M. (BNA) 2996. The initial opinion of the district court (Pet. App. 57-64) is unofficially reported at 101 L.R.R.M. (BNA) 2483.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1984. On March 19, 1985, the Chief Justice granted an extension of time within which to file a petition

for a writ of certiorari to and including April 25, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Master Printers of America (MPA) is a national trade association that serves approximately 5,000 non-union commercial printing companies (Pet. App. 2). It has a known anti-union viewpoint (*id.* at 42-43, 50). MPA is one of two divisions of Printing Industries of America, a non-profit association that also has a separate division for unionized printing employers, the Union Employers of America (*id.* at 57-58). Employers join MPA and Union Employers of America through the recruiting efforts of local affiliates of Printing Industries of America (*id.* at 3, 58). Upon joining a local affiliated association, unionized employers automatically become members of Union Employees of America, while non-union employers automatically become members of MPA and may participate in various MPA programs (*ibid.*).

One such MPA program is the "Craftmanship Program," in which employers nominate their employees for "Craftsmanship certificates" on the basis of job skills (Pet. App. 3, 58). Craftsmanship certificate holders receive a permanent free subscription to an MPA-edited quarterly, "Insight," that goes directly to employees' homes at addresses furnished by their employers (*ibid.*). MPA has described the subjects of "Insight" to include the "advantages of the open shop," and many articles in "Insight" have been "unabashedly anti-union" (*id.* at 3-4, 42-43, 47-50, 62). As the courts below found (*id.* at 4, 42-43, 50-51), these articles constituted "persuader activity" within the meaning of Section 203(b)(1) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 433(b)(1), which is defined to be "activities [pursuant to an agreement with an employer] where an object thereof is, directly or

indirectly * * * to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing."

2. Petitioner brought suit in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that it need not file the reports required under Section 203(b).[1] The Secretary of Labor filed suit on the same day to compel MPA to file such reports. The suits were consolidated and the district court granted summary judgment for the Secretary (Pet. App. 57-64). The court of appeals affirmed the district court's holding that MPA, as a trade association, is a "person" within the meaning of Section 203(b), but it reversed the grant of summary judgment and remanded for factual proceedings on the issue whether employers participating in the Craftsmanship Program entered into a persuader agreement with MPA (Pet. App. 52-55).

On remand, the district court conducted an evidentiary hearing and found that MPA had engaged in persuader activities pursuant to an agreement with employers (Pet. App. 46-51). The district court, however, declined to address MPA's constitutional arguments, since it believed that they had been resolved on the previous appeal. The court of appeals affirmed the factual finding that MPA had entered into a persuader agreement with certain of its

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[1]Section 203(b), 29 U.S.C. 433(b), requires persons who engage in persuader activities to file two types of disclosure reports. Within 30 days of entering into an agreement with an employer, the persuader must file a report that contains a statement of the terms and conditions of the agreement. A persuader must also file an annual report disclosing the names of each employer to whom it provided labor relations advice and services in that year, as well as its receipts and disbursements relating to labor relations advice and services. See *Humphreys, Hutcheson & Moseley* v. *Donovan*, 755 F.2d 1211, 1214-1215 (6th Cir. 1985).

employer-members, but it remanded the case for consideration of MPA's constitutional challenges (*id.* at 38-44).

Following the second remand and a further hearing, the district court held that Section 203(b) does not violate MPA's First Amendment rights and is not unconstitutionally vague (Pet. App. 31-37). The court of appeals affirmed (*id.* at 1-29). Applying the analysis in *Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976), the court first determined that any infringement of MPA's First Amendment rights is minimal. It viewed the allegations of a chilling of MPA's freedoms of speech and association with "skepticism" (Pet. App. 9), noting that much of MPA's evidence was entirely "speculative" and unsupported (*id.* at 8). In particular, the court found the evidence insufficient to show that disclosure would cause a decline in MPA's membership. It concluded, therefore, that MPA had failed to demonstrate "the sort of threat of physical harm and loss of employment found in *NAACP* v. *Alabama*, [357 U.S. 449 (1958),] and its progeny" (Pet. App. 6-10). The court also determined (*id.* at 10-16) that, even if MPA had suffered some infringement of First Amendment rights, that infringement was justified by compelling public interests in deterring corruption and enhancing the government's ability to investigate that were "substantially related" to the LMRDA disclosure scheme (Pet. App. 15). The court further ruled (*id.* at 16-20) that the nature of the disclosure required by Section 203(b) is carefully tailored and "absolutely essential" to serve its purposes (Pet. App. 17).

The court of appeals also rejected MPA's contention that Section 203(b) is impermissibly vague. It found that the term "persuade," especially when understood in the context of the statutory provision that requires both an agreement with an employer and an intent to persuade, conveys adequate notice of what is reportable conduct (Pet. App. 20-24). In addition, the court of appeals held that the 30-day

reporting requirement does not constitute a "prior restraint" on free speech because it does not involve a direct restraint that prohibits speech but rather requires only the legitimate disclosure of information (*id.* at 25-27).

ARGUMENT

In an extensive opinion on which we rely, the court of appeals considered and rejected each of the arguments raised by petitioner. The decision below does not conflict with any decision of this Court or any other court of appeals. Rather, it is in accord with the uniform decisions of the courts of appeals denying challenges to the constitutionality of Section 203(b) of the LMRDA. See *Humphreys, Hutcheson & Moseley* v. *Donovan*, 755 F.2d 1211, 1219-1223 (6th Cir. 1985); *Marshall* v. *Stevens People & Friends for Freedom*, 669 F.2d 171, 176-180 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); *Wirtz* v. *Fowler*, 372 F.2d 315, 334-335 (5th Cir. 1966), overruled in part on other grounds, *Price* v. *Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc); *Donovan* v. *Master Printers Ass'n*, 532 F. Supp. 1140, 1147-1152 (E.D. Ill. 1981), aff'd on opinion below, 699 F.2d 370 (7th Cir. 1983), cert. denied, No. 83-559 (Jan. 9, 1984). Furthermore, this Court recently denied review in a case involving a related printing employer trade association that presented a similar constitutional challenge to Section 203(b) and raised many of the same legal arguments. See *Donovan* v. *Master Printers Ass'n, supra.* Accordingly, further review by this Court is unwarranted.

1. Petitioner contends (Pet. 7-14) that the term "persuade" in Section 203(b) is impermissibly vague because MPA could not have anticipated that its distribution of "Insight" to employees at the request of their employers would be considered reportable unless it took place in the context of a specific union organizing campaign or was directed toward the employees of a particular company.

As the court of appeals correctly concluded, however, the term "persuade" " 'conveys sufficiently definite warning as to the [reportable] conduct when measured by common understanding and practices' " (Pet. App. 22, quoting *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947)). Indeed, both courts below characterized "persuade" as a "common every day word—easily capable of being understood" (Pet. App. 22, 34). See also *Douglas* v. *Wirtz*, 353 F.2d 30, 33-34 (4th Cir. 1965), cert. denied, 383 U.S. 909 (1966); *Donovan* v. *Master Printers Ass'n*, 532 F. Supp. at 1152 ("the Act is only vague because defendant chooses to make it so").

Moreover, viewed in the "particular context" of Section 203(b), use of the term "persuade" conveys sufficiently definite notice of what transactions are reportable. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 112 (1972), quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950). The statutory provision specifies that the persuasion must be pursuant to an agreement with an employer, must be directed to an employee, and must have as its subject the exercise of an employee's right to organize and bargain collectively. In addition, since persuasion must be "an object" of the agreement, the provision includes an element of intent on the part of the persuader. These requirements eliminate any vagueness in "persuade" that might exist if the term were considered in the abstract.[2]

MPA argues (Pet. 7-8) that application of the disclosure requirement to regular publication of a magazine unrelated to a specific organizational campaign is an unwarranted extension of the persuader provision. The court of appeals succinctly answered this assertion: "What matters is not the precise union dispute that is discussed, but rather

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[2]Because Section 203(b) is therefore drawn with specificity, it requires no further limiting construction, as petitioner argues (Pet. 13). See pages 7-8, *infra*.

whether the article is distributed pursuant to an agreement with an employer, and whether it is published with the *intention* to persuade employees about the merits of union organizing and collective bargaining" (Pet. App. 23 (emphasis in original)). By the plain terms of Section 203(b), "persuasion" can be accomplished through distribution to employees of an article with an anti-union focus, even if it is not directed to any specific organizing campaign.

Furthermore, based on the record in this case, MPA had reasonable notice that Section 203(b) would apply to its distribution of "Insight" directly to employees. It was "well aware" that it had entered into specific arrangements with employers to distribute "Insight" (Pet. App. 23). Likewise, MPA itself had described "Insight" as including articles explaining the "advantages of the open shop" (*id.* at 3-4), and "[e]ven a cursory reading of the enumerated articles reveals that they are unabashedly anti-union" (*id.* at 50). Under these circumstances, petitioner was on notice that the mailing of "Insight" would trigger disclosure.

Contrary to petitioner's contention (Pet. 10-14), the decision below does not conflict with *Thomas* v. *Collins*, 323 U.S. 516 (1945). In *Thomas*, a state statute required labor union organizers to register before presenting any public speech soliciting union membership, and the state sought to enforce the statute by obtaining a temporary restraining order against a union organizer. This Court held that such a prior restraint on speech violated the First Amendment (323 U.S. at 540). In contrast, disclosure provisions such as Section 203(b) do not constitute a prior restraint. See *Buckley* v. *Valeo*, 424 U.S. 1, 81-82 (1976). Rather, they are valid if they reasonably serve a compelling governmental interest.

Moreover, any ambiguity surrounding the terms "solicit" in the Texas statute at issue in *Thomas* (323 U.S. at 534-535) and "advocate" in the federal statute under consideration in

Buckley v. *Valeo* (424 U.S. at 42-43) is not present in the LMRDA. The absence of limiting language in those statutory schemes permitted "solicit" and "advocate" to have various plausible meanings inhibiting free speech. The LMRDA, however, contains specific qualifications that the persuasion must take place pursuant to an agreement with an employer, be directed to employees, and be addressed to employee organizing and collective bargaining rights. As the court of appeals aptly concluded (Pet. App. 24-25 n.14), "the key term of § 203 is as carefully delineated, defined, and articulated as one could reasonably expect within a statutory framework."

2. Petitioner argues (Pet. 16-19) that the court of appeals misinterpreted and misapplied the "evidentiary standards" for showing a violation of the First Amendment. Petitioner's dispute with the "standard" applied by the court below is without merit. Contrary to MPA's assertion (Pet. 16), the court specifically acknowledged that a litigant must only show a "reasonable probability" that compelled disclosure would have a chilling effect (Pet. App. 8); at the same time, the court clearly found that the evidence here did not demonstrate any likelihood whatever of adverse effects (*id.* at 8-9). Nor did the court limit its inquiry to proof of "threats, harassment or reprisals" to the exclusion of "economic reprisal" or other "public hostility," as petitioner asserts (Pet. 16); rather, it considered all the evidence of the purported consequences of disclosure offered by petitioner (Pet. App. 8-9; see also *id.* at 36). Finally, petitioner's contention (Pet. 17) that the court did not consider proof of reprisals against MPA members or the organization itself is belied, as petitioner acknowledges (Pet. 19), by the court's express conslusion that MPA had not shown that disclosure would force a decline in its membership (Pet. App. 8-9).

Petitioner's arguments relating to the application of the *Buckley* v. *Valeo* standard (Pet. 17-19) are largely based on its disagreement with the district court's factual findings, which were affirmed by the court of appeals. There is no occasion for this Court to review these factual findings concurred in by two lower courts. See, *e.g., Tony & Susan Alamo Foundation* v. *Secretary of Labor,* No. 83-1935 (Apr. 23, 1985), slip op. 8. In any event, the courts below properly determined that petitioner had failed to make the requisite factual showing that disclosure of the information sought by the Secretary would deter employers from associating with the organization. See *Buckley* v. *Valeo,* 424 U.S. at 69-74; *NAACP* v. *Alabama,* 357 U.S. 449, 462-463 (1958). The harms that MPA alleged were "speculative" and in any case far less significant than the types of consequences that have been deemed sufficient to show that disclosure would chill the exercise of First Amendment rights. In particular, the court of appeals described the testimony that MPA members have considered withdrawing from the association (Pet. 17) as based on a "casual reference" rather than on careful documentation of MPA's membership statistics (Pet. App. 8). Indeed, petitioner concedes (Pet. 19) that no member has yet withdrawn from the MPA. By the same token, the allegation that disclosure would make MPA members "easy" targets for organizational attempts (Pet. 17) was viewed with "skepticism" by the court because "knowledgeable persons in the industry already know which shops are unionized and which are not" (Pet. App. 9). The court also found it unlikely that competitors could derive useful information from knowing the amount of dues an employer pays to MPA (Pet. 18; Pet. App. 9). These determinations are adequately supported in the record. See Pet. App. 8-9 & n.3, 36.

3. Petitioner contends (Pet. 20-28) that the decision below is inconsistent with this Court's rulings that compelled disclosure of associational ties may infringe the right of association protected by the First Amendment. See, *e.g.*, *Gibson* v. *Florida Legislative Investigation Commission,* 372 U.S. 539 (1963). Petitioner acknowledges (Pet. 20) that disclosure laws are constitutional if the governmental interest they serve outweighs the chilling effect disclosure may have on the exercise of First Amendment rights and if there is "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley* v. *Valeo,* 424 U.S. at 64 (footnotes omitted), quoting *Bates* v. *City of Little Rock,* 361 U.S. 516, 525 (1960), and *Gibson* v. *Florida Legislative Investigation Commission,* 372 U.S. at 546. Petitioner argues, however, that the court below misapplied these principles in upholding the constitutionality of Section 203(b).

The court of appeals correctly held (Pet. App. 10-15) that Section 203(b) serves a compelling governmental interest. Contrary to petitioner's suggestion (Pet. 20-21), a disclosure provision, to be valid, need not be justified by the government's interest in "self-preservation." See, *e.g., California Medical Ass'n* v. *FEC,* 453 U.S. 182, 197-199 (1981); *Buckley* v. *Valeo,* 424 U.S. at 66-68. Indeed, this Court has held that there is a compelling interest in regulating labor-management relations that justifies even direct, content-based limitations on free speech, and that the free speech rights of employers "cannot outweigh the equal rights of employees to associate freely." *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 617 (1969). Cf. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 778 n.3 (1976) (Stewart, J., concurring) (noting the compelling interest in maintaining "antiseptic conditions in the labor relations context").

The court below properly relied on these principles in concluding that Section 203(b) is supported by a compelling governmental interest. As the court explained, Section 203 was enacted "for the purpose of serving the twin 'compelling' governmental interests of deterring actual corruption and bolstering its own ability to investigate 'in order to act and protect' " (Pet. App. 14 (footnote omitted), quoting *Gibson* v. *Florida Legislative Investigative Commission,* 372 U.S. at 544). Accord *Humphreys, Hutcheson & Moseley* v. *Donovan,* 755 F.2d at 1221-1222. The court recognized that "the need for compelled disclosure under the Act grew out of Congressional findings that 'union busting' management middlemen were working with employers to undermine employee efforts to exercise their § 7 rights [under the National Labor Relations Act]" and these findings were based on "lengthy investigations into organized labor" (Pet. App. 11 & n.6). See *Donovan* v. *Master Printers Ass'n,* 532 F. Supp. at 1141-1143, 1148-1150; S. Rep. 187, 86th Cong., 1st Sess. 10, 12 (1959).[3] Congress thus concluded, as the court below summarized, that outside consultants had engaged in instances of "corruption and bribery" (Pet. App. 12) and that the use of persuaders "boded ill for an area of law that was already 'pervasively regulated' " (*id.* at 12-13 (citation omitted)). In Congress's view, persuader activities, whether or not illegal, were "disruptive of harmonious labor relations" (*id.* at 14), and the remedy of disclosure was a necessary means "to prevent return to the 'economic warfare of the nineteenth century' " (*id.* at 13, quoting *Donovan* v. *Master Printers Ass'n,* 532 F. Supp. at 1148).

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[3]The tactics with which Congress was concerned included direct employee contact by middlemen, surreptitious expenditures to distribute distorted information to employees, the creation of company dominated unions, and other practices that Congress believed were unethical or illegal. S. Rep. 187, *supra,* at 12.

Moreover, as the court below concluded (Pet. App. 15-16), Section 203(b) is substantially related to the furtherance of the compelling governmental interest in peaceful labor relations. See *Humphreys, Hutcheson & Moseley* v. *Donovan,* 755 F.2d at 1222; *Donovan* v. *Master Printers Ass'n,* 532 F. Supp. at 1150. First, the required disclosure enables employees to know the true nature and interests of the consultant that is attempting to persuade them to exercise their protected rights in a particular way. "This type of exposure discourages potential abuse and dramatically reduces the appearance of impropriety in an area where there has been a demonstrated propensity for wrongdoing" (Pet. App. 15). Second, disclosure alerts the Labor Department, the National Labor Relations Board, and unions to the potential involvement of a third party in the commission of unfair labor practices or other tactics that undermine the employees' rights to choose their own representatives.[4]

These justifications for disclosure are, as the court of appeals observed (Pet. App. 19), "remarkably similar" to the justifications for disclosure of campaign contributions

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[4]The facts that petitioner is a clearly identified employer organization engaged in persuader activity and that "Insight" is clearly identified as an MPA publication (Pet. 21-22) do not exempt petitioner from the disclosure requirements. See Pet. App. 16-17. In enacting Section 203(b), Congress did not distinguish between disclosed and undisclosed persuaders. *Humphreys, Hutcheson & Moseley* v. *Donovan,* 755 F.2d at 1215. Interested government agencies, as well as employees, are entitled to be kept informed of petitioner's continuing activities and to evaluate its labor practices and compliance with the law. While Congress was concerned with covert persuasion, it did not attempt to outlaw abuses by middlemen but rather sought to expose all details of their activities to publicity. See *Wirtz* v. *Fowler,* 372 F.2d at 324-325 n.23. And this public exposure "was to include not only the fact that the consultant was paid by management, but why he was paid, how much he was paid, and the practices he engaged in to earn his pay" (*id.* at 325). Accordingly, disclosure by petitioner of the details of its labor activities is necessary to further the public scrutiny purposes of the Act.

and expenditures upheld in *Buckley* v. *Valeo,* 424 U.S. at 66-68. Thus, disclosure under Section 203(b), like disclosure of campaign contributions and expenditures, serves to deter corruption, allows employees to know the source of their information, and acts as "an essential means of gathering the data necessary to detect violations of [other requirements of the statute]." 424 U.S. at 68.[5]

Finally, the court of appeals correctly ruled (Pet. App. 16-19) that the disclosure requirements of Section 203(b) are carefully tailored to serve the Act's purposes. In each of the two required reports, "only the information necessary to inform employees and the Secretary of the consultant's labor relations activities" must be disclosed (*id.* at 18). Contrary to petitioner's position (Pet. 26-27), the court found "little significance" (Pet. App. 17) in the fact that MPA must disclose information in the annual report relating to its labor-relations advice and services rendered to any

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[5]Nor does the decision below conflict, as petitioner asserts without elaboration (Pet. 24), with this Court's recent decision in *FEC* v. *National Conservative Political Action Committee,* No. 83-1032 (Mar. 18, 1985). In *National Conservative Political Action Committee,* the Court struck down the provision in the Presidential Election Campaign Fund Act that made it a criminal offense for an independent political committee to spend more than $1,000 to further a candidate's election in instances where the candidate has chosen to receive public financing. The case did not involve a disclosure provision and, apart from its treatment of the general First Amendment principles that we have already discussed, the Court's decision has no relevance to the instant petition. Moreover, while Section 203(b) only applies, as petitioner points out (Pet. 24), where persuasion activity occurs pursuant to an agreement between the persuader and the employer (see pages 6, 8, *supra*), that is not an unconstitutional distinction between individual and collective action; rather, it is simply a reflection of the fact that the Act is directed to the involvement of middlemen in the labor relations process and the special problems they pose, not to the unilateral conduct of employers.

of its employer-members, including those not participating in the Craftsmanship Program. Congress viewed management persuaders as inherently suspect, and thus sought to focus attention on all their activities. See *Price* v. *Wirtz,* 412 F.2d at 650. As the court below reasoned, "[i]n order to deter both actual corruption and the appearance of corruption, Congress concluded that it would be necessary to require the disclosure of a wide-ranging number of employers and activities, even if it meant reporting activities that were not improper" (Pet. App. 17, citing S. Rep. 187, *supra,* at 10).[6]

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[6]The decision below also does not conflict, as petitioner argues (Pet. 27-28), with *Familias Unidas* v. *Briscoe,* 619 F.2d 391 (5th Cir. 1980). In that case the court of appeals held that a Texas statute requiring public disclosure of the members of any organization that interfered with the peaceful operation of the school system was unconstitutional on the ground the the governmental interest in maintaining peaceful schools is not served by disclosure of members who did not participate in and had no knowledge of the organization's illicit goals. As the court below recognized (Pet. App. 20 n.12), unlike the Texas statute Section 203(b) does not make membership in an organization grounds for disclosure. Rather, it hinges disclosure on the existence of specific labor relations contact with a persuader (Pet. App. 20 n.12). Furthermore, Congress determined that the suspect activities of persuaders justified the disclosure of all their labor relations contacts and practices. Compare 619 F.2d at 401 (*Familias Unidas* did not involve organizations "having a demonstrated track record of illicit conduct"). Thus, in contrast to *Familias Unidas,* Section 203(b) does not seek or require the disclosure of purely passive and innocent membership in organizations with no substantial history of activity that the legislature found to be harmful to the public interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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